

on the successors or representatives of the decedent.” *Brooks v. Arthur*, No. 6:08-cv-28, 2011 WL 1212254, *1 (W.D.Va. Mar. 30, 2011) (citing *Fariss v. Lynchburg Foundry*, 769 F.2d 958, 961–62 (4th Cir. 1985) (“Personal service of the suggestion of death alerts the nonparty to the consequences of death for a pending suit, signaling the need for action to preserve the claim if so desired.”)). Service of the suggestion of death on the decedent’s attorney alone is insufficient. *See Fariss*, 769 F.2d at 962.

There is no indication on the record that the Suggestion of Death has been served on any successors or representatives of Hill pursuant to Fed. R. Civ. P. 4.¹ Therefore, Plaintiff’s counsel is instructed to serve a copy of its Suggestion of Death [ECF No. 31] and this order, pursuant to Fed. R. Civ. P. 4, on any known nonparty successor or representative of Hill and to file proof of said service by **February 10, 2022**. If no party files a motion for substitution within 90 days from the service of the personal representative, the court will determine whether this action should be dismissed.

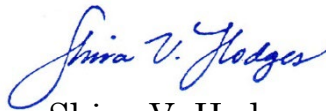
¹ The successors or representatives of the decedent are “those empowered to assert any legal claims of the decedent not extinguished by death, or to defend the estate against others’ claims.” *Fariss* at 962; *see also Atkins v. City of Chicago*, 547 F.3d 869, 873 (7th Cir. 2008) (“[A]n obviously interested non-party . . . must be served for the 90-day clock to start running.”); *Torres v. Bayer Corp. (In re Baycol Prods. Litig.)*, 616 F.3d 778, 784–85 (8th Cir. 2010) (“[U]nder certain circumstances, a person may be a ‘successor’ under Rule 25(a)(1) if he is (1) the primary beneficiary of an already distributed estate; (2) named in a will as the executor of the decedent’s estate, even if the will is not probated; or (3) the primary beneficiary of an unprobated intestate

The court notes that before Fed. R. Civ. P. 25(a) can be employed to substitute a new party for a deceased party, the substantive law controlling the suit must allow for survival of the cause of action. Where the cause of action does not survive the death of a party, there can be no substitution for that party under the rule. *See, e.e., Asklar v. Honeywell, Inc.*, 95 F.R.D. 419, 422 (D. Conn. 1982) (holding substantive law, not Rule 25(a), determines whether case may proceed after death of party).

The court suspends the deadlines in the scheduling order pending service of the suggestion of death and expiration of 90 days thereafter.

IT IS SO ORDERED.

January 27, 2022
Columbia, South Carolina



Shiva V. Hodges
United States Magistrate Judge

estate which need not be probated.”).